TRANSFER PRICING

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PFIZER HEALTHCARE INDIA PVT LTD [Writ Appeal nos. 1120 of 2021 etc {Madras HC}]

The assessees had filed a batch of writ petitions challenging the order of TPO issued on November 01, 2019, after the time limit prescribed u/s 92CA(3A) r.w.s. 153(1) (which requires TPO to pass order before 60 days prior to the last day on which the period of limitation referred to in Section 153 for making assessment, expires).

The assessees mainly contended that the TP order was passed beyond the statutorily prescribed limitation in Section 92CA(3A) and therefore, was bad in law, void ab initio and legally not sustainable. Referring to Section 92CA(3), it was argued that the TPO has no other option except to pass an order within the time limit prescribed under the statute.

Countering Revenue argument under the General Clauses Act and referring to the language of Sec 92CA(3A), it was contended that the last date of limitation prescribed under the Act will have to be excluded as the section uses the phrase "prior to" the date and not merely the phrase "to" on which date the period of limitation expires. Therefore, the last date, for the purpose of computation of 60 days period, has to be computed from 30.12.2019 which is prior to 31.12.2019. While computing the 60 days backwards from 30.12.2019, the 60th day falls on 01.11.2019, including 30.12.2019 and 01.11.2019. However, the Section states that "before 60 days prior to limitation under Section 153 of the Act" which means the order of assessment should be passed before 01.11.2019, excluding the first day and as such 31.10.2019 will be the last date for the Transfer Pricing Officer to pass the Transfer Pricing Assessment Order.

HC remarked that the order of the TPO has been challenged on the ground of limitation, which goes to the root of authority/jurisdiction. There is no dispute on the facts about the date on which the order was passed, which is 01/11/2019 in all the cases or the receipt of such orders for the purpose of calculation of limitation. What was called upon to be adjudicated is the interpretation of the provision, which is a pure question of law in the present cases. Therefore, HC held the writ petitions to be maintainable and has been rightly entertained by the Learned Judge.

Referring to Sec 92CA, Sec 153 of the Income tax Act and Section 9 of the General Clauses Act, HC held that for AY 2016-17, *"The period of 21 months would commence on 31.03.2017, the assessment year ended on 31.12.2018 normally and the extended period would end on 31.12.2019 and not on 01.01.2020. The contention of the appellants that the time to pass the assessment order would end at 00.00 hours on 01.01.2020, is fallacious as 31.12.2019 would end at 23:59:59 and 00.00 is regarded as the next day." HC further remarked that "The "date" must not be reckoned with respect to sun rise but with respect to the time of 24 hours in a day. The moment last minute of the day expires, the day ends and the next moment which is the first moment of the next day becomes irrelevant for the purpose of reckoning the period of limitation."* For this, HC drew support from the FAQs on times of day by National Institute of Standards and Technology of the United States Government, the Times and Frequency Division. Reference was also made to SC ruling in B.N. Agarwalla v. State of Orissa. Referring to the language of Sec 153 and Sec 92CA, HC remarks that *"while interpreting a taxing statute, is the explicit and clear language used by the parliament while enacting the law. If the language employed in any statute is clear and unambiguous from its plain and natural meaning, external aid for interpretation are unnecessary."*

Revenue's contention that the usage of the word "may" in Section 92CA (3A) indicates that the time fixed is only directory, a guideline, not mandatory and is for the sake of internal proceedings was rejected. It was noted, "Once reference is made and after availing the benefit of the extended period to pass orders, the department cannot claim that the time limits are not mandatory."

HC accepts assessee's contentions that the word "may" has to be sometimes read as "shall" and vice versa depending upon the context in which it is used, the consequences of the performance or failure on the overall scheme and object of the provisions would have to be considered while determining whether it is mandatory or directory.

Hence, upon consideration of various rulings and the scheme of the Act, it was held that *"we are of the opinion that the word "may" used therein has to be construed as "shall" and the time period fixed therein has to be scrupulously followed. The word "may" is used there to imply that an order can be passed any day before 60 days and it is not that the order must be made on the day before the 60th day."*

Quashes TP Order being Time Barred - Time limit for passing TP order under Section 92CA(3A) 153 mandatory – M/s. Pfizer Healthcare India Private Limited [TS-199-HC-2022(MAD)-TP] (AY 2016-17) and Tata Power Solar Systems Ltd [TS-187-ITAT-2022(Bang)-TP] (AY 2011-12)

In two different rulings and two different Assessment Years, the Hon'ble High Court and Tribunal quashed the TP Order as barred by limitation of time.

All Respondents in batch barring (WP No. 1120 of 2021 etc., batch - TS-199-HC-2022(MAD)-TP) challenged orders passed under Section 92CA(3) of the Act. The Respondents contented that the TP orders passed dated 1st November 2019 for AY 2016-17 is barred by limitation by one day.

Tata Solar Power Ltd. in TS-187-ITAT-2022(Bang)-TP contended that the order passed by the TPO for A.Y 2011-12 is barred by limitation as the order was passed on 30 January 2015, despite date of limitation expiring on 29 January 2015.

Both Hon'ble High Court and Hon'ble Tribunal answering the questions of law in favour of the Assessee and against the Revenue Department, held as under:

- The use of the word `may' in sub-section (3A) of section 92CA is to be construed as `shall';
- The time limit to pass the order as per sub-section (3A) of section 92CA is mandatory and not directory in nature;
- The TPO is bound by such limitation and any defect shall not be considered as curable;
- Such action / defect cannot be considered as an irregularity to get any protection under Section 292BB of the Act;
- Refuses to accept Revenue's extensive reliance on General Clauses Act over calculation of the 60 days period and whether 31.12.2019 ought to be excluded or included for the said calculation; In the same context, Hon'ble High Court also rules that 'midnight' or '00:00' hrs is always used to denote the beginning of the next date;
- While quashing Revenue's writ appeal, Hon'ble High Court rejects 'alternate remedy' availability plea, reasoning that in the instant case the TPO order has been challenged on the grounds of limitation, which goes to the root of authority/jurisdiction.

For easy reference of the readers, Tabulated below are TP order due dates for AY 2010-11 to AY 2016-17.

Assessment Year	TP Order Due date
AY 2010-11	29 January 2014
AY 2011-12	29 January 2015
AY 2012-13	30 January 2016
AY 2013-14	31 October 2016
AY 2014-15	31 October 2017
AY 2015-16	31 October 2018
AY 2016-17	31 October 2019

In the interest on Natural Justice and considering COVID-19 restrictions, condones delayed filing of objections before DRP - Sresta Natural Bioproducts Ltd [TS-197-ITAT-2022(HYD)-TP]

Facts:

- The Assessee contended that it had filed the objections and paper book before the DRP through email on 28th April 2021 and the hard copy was couriered to DRP office on the same date. However, the courier got delivered to DRP office on 15th June 2021 due to COVID-19 lockdown.
- DRP dismissed the objections by holding that the objections filed before them were not maintainable as they were beyond the statutory limitation. Time limit to file objections were up to 31 May 2021.

Tribunal's Ruling

Hon'ble Tribunal noted as under:

"We find force in the arguments of the ld. AR of the assessee that due to covid-19 pandemic lockdown, the assessee failed to represent its case before the DRP and failed to file its objections within the stipulated time. We, therefore, rely on the judgment of the Hon'ble Supreme Court recent directions dated 27-04-2021 in M.A.No.665/2021 in SM(W)C No.3/2020 'In Re Cognizance for extension of limitation' making it clear that in such cases where the limitation period (including that prescribed for institution as well as termination) shall stand excluded from 14th of March, 2021 till further orders. Accordingly, to meet the ends of justice, we remit the issue back to the file of the DRP with a direction to decide the appeal afresh after taking into consideration the objections filed by the assessee before them and in accordance with law after providing opportunity of being heard to the assessee in the matter. The assessee is directed to substantiate its claim before the DRP by way of documentary evidence without seeking any adjournments.

Thus, the grounds raised by the assessee are treated as allowed for statistical purposes."

Operating Profit to Value Added Expenses ('OP/VAE') as known as "Berry Ratio" appropriate PLI for logistics and freight forwarding service provider - DHL Logistics Private Limited [TS-174-ITAT-2022(Mum)-TP]

Facts:

- The Assessee is engaged in the business of transportation as principal, agent at home and overseas, customs clearing agents, to provide every kind of operation in connection with transportation.
- The Assessee had benchmarked its international transactions as per the Transactional Net Margin Method (TNMM) at entity level using OP/VAE as Profit Level Indicator ('PLI').
- The TPO was of the view that OP/VAE could not be considered appropriate PLI. Accordingly, the TPO adopted operating profit to the operating costs ratio (OP/OC) as an appropriate PLI for benchmarking the international transactions of the Assessee.
- The TPO also proposed some variation in the comparable companies selected and proposed a TP adjustment. DRP largely upheld the approach of the TPO in this regard.

Tribunal's Ruling

Hon'ble Tribunal relied on coordinate bench decision in the Assessee's own case for earlier years and ruled in favor of the Assessee.

Hon'ble Tribunal in earlier years' decision, after deliberating at length concluded that (a) the 'Freight Expenses' paid to third parties by the Assessee are pass-through in nature; and (b) Operating Profit / Value Added Expenses ('OP/ VAE') is an appropriate PLI for benchmarking the logistics services and Freight forwarding business provided by the Assessee. The Hon'ble Tribunal conclusion were based on the following reasoning:

- The Assessee does not carry out function of "freight transportation" itself, nor does it assume risks or employ assets in relation to freight services;
- The Assessee merely acted as an agent of third-party airlines / ocean carrier which can be evident from the agreements and invoices;
- The net margin realized by the Assessee pursuant to its international transactions with its AEs are to be determined only with reference to the cost incurred directly by the Assessee itself and its profit margin cannot be imputed on the basis of the cost incurred by the third party or unrelated parties;
- Acknowledging that not all comparable companies disclose VAE expenses separately, the ITAT has remanded the matter to the file of the AO / TPO for conducting a fresh benchmarking analysis and directing to select only those companies which had provided their VAE separately.
- Taking note of the Assessee's reliance on RBI regulations, Remands ALP determination of buy back of equity shares - Givaudan (India) Pvt Ltd [TS-190-ITAT-2022(Bang)-TP]

Facts:

- The Assessee had undertaken a buy-back of equity shares from its parent company which was considered to be an international transaction by the TPO. The TPO proceeded to benchmark the same based on "Net Asset Value ('NAV') method for valuation of shares and compared it against the share valuation adopted by the Assessee using the Earning Per Share ('EPS') method to propose a TP adjustment;
- DRP upheld TPO's proposed adjustment based on NAV method citing that the method followed in accordance with RBI guidelines did not consider the provisions of Chapter X of the Act.

Tribunal's Ruling

- Hon'ble Tribunal notes Assessee's contentions that as per RBI guidelines, in case the transfer of shares was by a non-resident, where the shares of an Indian company were not listed on a stock exchange (amount of consideration payable being more than INR 20 lakh), price could be based on EPS, or a price based on NAV, whichever was higher;
- Hon'ble Tribunal also appreciated the Assessee's argument that it considered INR 804.60 as value of shares for the buy back from AE, however TPO disregarded the RBI regulations and considered value of shares at INR 572.42 based on NAV method without providing any cogent reason;
- Hon'ble Tribunal observes that valuation of the Assessee in determining the price at which the shares have been brought back had not been verified by the authorities below.
- Accordingly, directs Assessee to file requisite details to support its claim and further directs AO/TPO to carry out necessary verification and consider the claim in accordance with law.